No. 85-588

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE UNIVERSITY OF TENNESSEE, *et al.*,
Petitioners,

v.

ROBERT B. ELLIOTT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

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REPLY BRIEF

ARGUMENT

I. RESPONDENT'S ARGUMENT THAT THE PARTICULAR AGENCY ADJUDICATION IN THIS CASE SHOULD BE DENIED FULL FAITH AND CREDIT IS NOT RESPONSIVE TO THE ISSUES BEFORE THIS COURT.

The question upon which this Court granted review is simply this: whether traditional principles of preclusion apply in actions under the Reconstruction statutes and Title VII to issues fully and fairly litigated before a state agency acting in a judicial capacity. Instead of addressing this question, the principal portion of respondent's brief is devoted to the argument that full faith and credit should not extend to the particular agency adjudication in this case because respondent was denied a full and fair

opportunity to litigate all of his allegations of race discrimination and therefore all of his claims under the Reconstruction statutes and Title VII were not decided by the agency. That question, which respondent did not raise at any time in the proceedings below, relates exclusively to the scope of preclusion to which the agency adjudication in this case is entitled under Tennessee law.

The Sixth Circuit did not review the proceedings before the state agency; nor did it give any consideration to the preclusive effect to which the agency adjudication is entitled under Tennessee law. Rather, wholly without regard to the scope and fairness of the agency adjudication in this particular case, the Sixth Circuit held that, in the absence of state court review, no adjudication of issues by a state agency is *ever* entitled to full faith and credit in a subsequent employment discrimination action.[1] That holding alone is the subject of review in this Court. Only after the question presented in this Court is resolved in favor of full faith and credit is there any need to resolve the further question of the extent to which the agency adjudication is entitled to preclusive effect in Tennessee courts. As this Court has recognized in *Marrese v. American Academy of Orthopaedic Surgeons*, —— U.S. ——, 105 S. Ct. 1327 (1985), and *Parsons Steel, Inc. v. First Alabama Bank*, —— U.S. ——, 106 S. Ct. 768 (1986), the issue raised by respondent—namely, the preclusive effect to which the agency adjudication is entitled under Tennessee law—is best left to the district court for its determination.[2]

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[1] Under the Sixth Circuit's holding, the agency adjudication would be entitled to no preclusive effect even if respondent had been completely successful in his efforts to admit evidence of race discrimination unrelated to his proposed termination and in his efforts to have the agency try his claims under the Reconstruction statutes and Title VII.

[2] Respondent supports his argument that the particular agency adjudication in this case should be denied full faith and credit by

Despite the contrary impression respondent now seeks to create, the issue of alleged racial motivation for respondent's proposed termination was fully and fairly litigated *and* decided in the agency adjudication.[3] Respond-

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relying heavily on selective excerpts from the 5000-page transcript of the agency proceedings. The transcript was never entered into the record in the district court or the Sixth Circuit, however, and it is not properly before this Court. Respondent's ex parte augmentation of the record raises serious questions of procedural fairness of which respondent is otherwise so solicitous.

Respondent also supports his argument with allegations of inherent bias in the contested case provisions of the Tennessee Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-301 through -323 (1985), and bias on the part of the Administrative Law Judge. The agency proceedings were conducted, however, precisely in accordance with the governing statutory provisions which respondent freely and purposefully invoked. At no point in the proceedings themselves, in the district court, or in the Sixth Circuit did respondent ever allege that the proceedings were conducted in violation of the statutory provisions. Nor did he ever challenge the objectivity of the Administrative Law Judge. Respondent's request, prior to the appointment of the Administrative Law Judge, for appointment of an individual with no relationship to the University certainly cannot be construed as a challenge to the objectivity of the individual who later was appointed. If the Administrative Law Judge had evidenced bias during the course of the agency proceedings, respondent could have petitioned for his disqualification pursuant to Tenn. Code Ann. § 4-5-302 (1985). Failing that, he could have raised any due process concern either in a petition for review in state chancery court or in his post-hearing motions in district court. Respondent did neither.

[3] Under well-accepted principles of issue preclusion—which is what petitioners seek in this case—an issue is conclusive in a subsequent action between the parties, whether on the same or a different claim, if the issue was litigated and determined and if the determination was essential to the prior judgment. *See generally* Restatement (Second) of Judgments § 27 (1982). Despite respondent's accusation to the contrary, petitioners' brief plainly argues that issues of individual discrimination raised by respondent's federal complaint were fully and fairly litigated *and* decided by the state agency. The requirement of a "full and fair opportunity to litigate" finds its source in numerous decisions of this Court and

ent concedes that the Administrative Law Judge only refused to decide discrimination issues "unrelated to the proposed termination of Elliott." (P.A. 171) Respondent likewise concedes that the Administrative Law Judge did decide the question of whether "employer's action in bringing charges against employee . . . [was] based on . . . racial discrimination." (P.A. 177)

In the district court, respondent openly admitted that he had litigated the issue of alleged discriminatory intent as an affirmative defense and that the Administrative Law Judge had decided the issue against him. (J.A. 27) Indeed, there is an abiding irony in respondent's elaborate argument that he was denied a full and fair opportunity to litigate race discrimination issues in the agency proceeding. For upon his return to federal court, respondent did not contend that he was unable to introduce proof of discrimination. Rather, respondent argued that his proof of race discrimination was so overwhelming that the contrary finding by the Administrative Law Judge was unsupported by substantial evidence. (J.A. 28, 30; Dist. Ct. Nr. 27, filed Oct. 24, 1983, at 1, 3, 8-9) Respondent did not seek de novo review of the issue of race discrimination in the district court; he simply sought review of the merits of the agency judgment on the basis of the record of the agency proceedings. (J.A. 24-30)

Respondent never challenged the adequacy or fairness of the procedures under which his due process hearing was conducted at any point in the proceedings below. In fact, the district court specifically found that respondent had received full procedural protection in the agency adjudication:

> Plaintiff makes no claim of denial of procedural due process. Nor can he in light of the long exhaustive evidentiary hearing in which plaintiff presented more than ninety witnesses, and cross-examined some of the agency's witnesses for more than thirty hours each. Plaintiff clearly has received full protection in this due process hearing, as required in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972).

(P.A. 31) As this Court explained in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), the concept of a full and fair opportunity to litigate acts simply, but importantly, as a federal restraint to ensure that a party against whom preclusion is asserted was afforded the minimum procedural requirements of due process. That the agency adjudication in this case satisfied the minimum requirements of procedural due process cannot seriously be disputed.

In their initial brief before this Court, petitioners acknowledged that the University successfully objected to respondent's attempt to file countercharges of race discrimination on the first day of the agency proceedings on the ground that the proceedings were not established for the purpose of prosecuting civil rights claims. (P.A. 44-45) Petitioners also acknowledge that the University successfully objected to some, but not all, of respondent's efforts to admit evidence of classwide discrimination and other allegations of discrimination unrelated to his proposed termination. Respondent's argument that the exclusion of evidence unrelated to his proposed termination somehow means, however, that the agency adjudication is entitled to *no* preclusive effect demonstrates his persistent confusion of issue preclusion with claim preclusion. Petitioners have never argued that claim preclusion applies to the agency adjudication. Rather, petitioners have plainly stated that they seek preclusion only of those issues actually adjudicated in the state agency proceedings, including respondent's affirmative defense that his proposed termination was racially motivated.

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cannot fairly be characterized—as it has been by respondent—as a "carefully chosen phrase" designed to create a false impression in this Court. (Resp. Br. at 41)

Respondent's repeated references to the agency's lack of jurisdiction to determine his civil rights claims under the Reconstruction statutes and Title VII is a curious reversal of his repeated attempts to try those claims before the agency. In any event, the agency's lack of jurisdiction over respondent's civil rights claims does not defeat the preclusive effect of the agency's adjudication of the issue of whether respondent's proposed termination was racially motivated—an issue undeniably within the scope of the agency's authority. *See* Tenn. Code Ann. § 4-5-322(h)(1) (1985). As this Court specifically held in *Marrese v. American Academy of Orthopaedic Surgeons*, —— U.S. ——, 105 S. Ct. 1327 (1985), a case which respondent does not even cite, a prior state adjudication of an issue is entitled to full faith and credit even if it involves a claim within the exclusive jurisdiction of the federal courts.

II. RESPONDENT'S ARGUMENT THAT ADMINISTRATIVE ADJUDICATIONS ARE NOT ENTITLED TO FULL FAITH AND CREDIT IS CONTRARY TO THE PURPOSE OF THE FULL FAITH AND CREDIT CLAUSE AND IS NOT SUPPORTED BY DECISIONS OF THIS COURT.

To avoid the mandate of full faith and credit in this case, respondent relies on what he concedes is simply a "literal reading" of the full faith and credit statute, 28 U.S.C. § 1738 (1982). Respondent's literal reading of § 1738 ignores the consistent holdings of this Court and the very purpose of the full faith and credit clause.

The purpose of the full faith and credit clause is "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." *Milwaukee County v. M. E. White Co.*, 296 U.S.

268, 276-77 (1935); *see Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980). By virtue of the constitutional provision and its implementing statute, state policies with respect to the effect of judgments rendered within a state are made a part of national jurisprudence. *See Riley v. New York Trust Co.*, 315 U.S. 343, 349 (1942). The purpose of full faith and credit unquestionably cannot be accomplished, therefore, unless *every* judicial proceeding which is entitled to preclusive effect in the rendering state is afforded full faith and credit by *every* other state and federal tribunal. Respondent's argument for an artificial distinction between types of judicial proceedings is in complete derogation of the very purpose of full faith and credit.

In addition to contradicting the notions of comity embodied in the full faith and credit clause, an artificial distinction between agency and court adjudications would intrude deeply into the sovereignty properly reserved to each state under fundamental principles of federalism. Under our federal scheme of government, each state is free to exercise its judicial power through its courts, or if it sees fit, through its executive and administrative agencies. *See generally* Restatement (Second) of Conflict of Laws §§ 24, 92 (1971). Under respondent's interpretation of full faith and credit, however, a state's exercise of its judicial power through its agencies would be impeded by the fact that the judgments of its agencies, unlike those of its courts, would not be entitled to full faith and credit. Respondent's reading of full faith and credit would also mean that state agency adjudications would be entitled to no preclusive effect even though federal agency adjudications undeniably are entitled to preclusive effect under this Court's holding in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966). There are no critical differences between state and federal agency adjudications which justify affording preclusive effect to one but not the other.

Because administrative agencies did not exist when the full faith and credit statute was first enacted, the absence of any express reference to agencies is in no way indicative of a congressional intention to exclude agencies from the operation of the full faith and credit statute. The nonsensical results produced by a literal reading of § 1738 further belie any such congressional intention. For, not only would state agency adjudications be entitled to no full faith and credit in state and federal court proceedings, but also state and federal court adjudications would be entitled to no full faith and credit in state and federal agency proceedings. These irrational results demonstrate the critical importance of applying principles of full faith and credit in a manner which accomplishes the constitutional purpose. That purpose can be accomplished only by affording full faith and credit to the judicial proceedings of every state tribunal empowered by state law to adjudicate disputes and entitled by state law to preclusion effect in the state's own courts.

The irrational meaning of full faith and credit produced by the literal reading of § 1738 urged by respondent and his amicus, the Equal Employment Opportunity Commission (EEOC), no doubt accounts for this Court's repeated pronouncement that issues adjudicated by a state agency are entitled to full faith and credit. In *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980), *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943), and *Chicago R.I. & P. Ry. v. Schendel*, 270 U.S. 611 (1926), this Court rightly refused to adopt the artificial distinction which respondent and the EEOC now urge this Court to draw between agency adjudications and court adjudications for full faith and credit purposes. Speaking for the plurality in *Thomas* and citing *Schendel*, Justice Stevens unequivocally acknowledged that the issues adjudicated by a state agency are entitled to full faith and credit: "To be sure, . . . the factfindings of state administrative tribunals are entitled to the same res judicata effect in the second state as findings by a court." 448 U.S. at 281.

Ignoring this statement and its supporting authority, respondent cites Justice Stevens' immediately subsequent reference to "the critical differences between a court of general jurisdiction and an administrative agency with limited statutory authority." *Id.* at 281-82. What respondent fails to recognize, however, is that the "critical differences" referred to by the plurality in *Thomas* had nothing at all to do with *issue* preclusion, but were relied upon instead to fashion the position that an agency adjudication will not preclude the subsequent assertion of a *claim* the agency was not empowered to adjudicate:

> Full faith and credit must be given to the determination that the Virginia Commission had the authority to make; but by a parity of reasoning, full faith and credit need not be given to determinations that it had no power to make.

Id. at 282-83.

More importantly, however, the five concurring and dissenting members of this Court in *Thomas* expressly refused to embrace the plurality's distinction between courts of general jurisdiction and administrative agencies even for claim preclusion purposes. Speaking for the concurring justices, Justice White said, "I do not see any overriding differences between workmen's compensation awards and court judgments that justify different treatment for the two." *Id.* at 289. Speaking for the dissenters, Justice Rehnquist also eschewed the plurality's denial of claim preclusion effect to the administrative adjudication, noting that the claimant "was free to choose the applicable law simply by choosing the forum in which he filed his initial claim." *Id.* at 294. The disagreement among members of this Court over the claim preclusion effect of worker compensation awards does not detract in the least from the unanimous agreement among mem-

bers of this Court that full faith and credit is due a state agency's adjudication of issues within the scope of its authority.

Implicit in the argument of respondent and the EEOC that § 1738 only requires federal courts to afford full faith and credit to state court judgments is the suggestion that Congress intended a limited application of full faith and credit in federal courts. This suggestion cannot be reconciled with this Court's decision in *Thomas* or with the purpose of full faith and credit. Underlying each of the separate opinions in *Thomas*, which was decided under § 1738, is the presumption that § 1738 requires federal courts to give full faith and credit to state agency adjudications. The adjudication in question was conducted by a state agency, and the second forum was the District of Columbia, a federal jurisdiction. Respondent's argument that § 1738 does not require federal courts to extend full faith and credit to state agency adjudications simply cannot withstand this Court's pronouncements in *Thomas*.[4] Furthermore, consistent with the purpose of full faith and credit, Congress did not provide for one effect in state courts and another effect in federal courts. Rather, Congress provided that judicial proceedings are entitled to the same full faith and credit whether the subsequent action is in state or federal court.

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[4] This Court is the final arbiter of the scope of full faith and credit. *See Thomas*, 448 U.S. at 271; *Magnolia*, 320 U.S. at 438. Pursuant to that role, this Court has determined that full faith and credit extends to state agency adjudications. This Court's pronouncements in *Thomas* are controlling, therefore, even though agencies are not specifically mentioned in § 1738. As explained by Justice Stevens in *Thomas*, "Congress' power in this area is not exclusive, for this Court has given effect to the Clause beyond that required by implementing legislation." 448 U.S. at 272 n.18, *citing Bradford Electric Co. v. Clapper*, 286 U.S. 145 (1932), in which this Court extended full faith and credit to state "Acts" even though § 1738 did not include an express reference to state "Acts" until amended in 1948.

In support of his argument that the full faith and credit statute applies only to state court judgments, respondent cites the decisions of this Court in *Allen v. McCurry*, 449 U.S. 90 (1980), *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), *Migra v. Warren City School District*, 465 U.S. 75 (1984), and *McDonald v. City of West Branch*, 466 U.S. 284 (1984), none of which holds that § 1738 applies only to state court judgments. *McDonaid*, for example, held that collective bargaining arbitration is not a "judicial proceeding" and therefore not entitled to full faith and credit under § 1738. *Allen*, *Migra*, and *Kremer*, on the other hand, did not even present the question of whether § 1738 applies to state agency proceedings but rather whether the Reconstruction statutes or Title VII in some manner repeal the full faith and credit due state court proceedings. Interestingly enough, however, this Court's statement in footnote 7 of *Kremer* appears premised on the assumption that full faith and credit does apply to agency adjudications. Otherwise, there would have been no reason to suggest in footnote 7 that Title VII's "substantial weight" requirement with respect to the findings of state deferral agencies may constitute an implied repeal of the full faith and credit due deferral agency decisions.

In full faith and credit cases decided in each of the last two terms, this Court reversed decisions of the Seventh and Eleventh Circuits for failing to apply the rules of preclusion of the state in which a judgment was rendered. *See Parsons Steel, Inc. v. First Alabama Bank*, —— U.S. ——, 106 S. Ct. 768 (1986); *Marrese v. American Academy of Orthopaedic Surgeons*, —— U.S. ——, 105 S. Ct. 1327 (1985). In *Parsons*, Justice Rehnquist warned against giving "unwarrantedly short shrift to the important values of federalism and comity embodied in the Full Faitn and Credit Act," 106 S. Ct. at 771, and quoting *Kremer*, reminded the courts of appeals that "'§ 1738 does not allow federal courts to employ their

own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.'" *Id.* at 771-72. In the absence of any express or implied repeal of the full faith and credit statute, therefore, the obligation of the Sixth Circuit in this case was clear: to give the agency adjudication the same issue preclusion effect it enjoys in Tennessee's own courts. The Sixth Circuit's failure even to consider Tennessee law of preclusion in this case requires that its judgment be reversed.

III. RESPONDENT HAS FAILED TO DEMONSTRATE THAT THE RECONSTRUCTION STATUTES IMPLIEDLY REPEAL THE FULL FAITH AND CREDIT DUE A STATE AGENCY ADJUDICATION.

In *Allen v. McCurry*, 449 U.S. 90 (1980), and *Migra v. Warren City School District*, 465 U.S. 75 (1984), this Court unequivocally held that neither the language nor legislative history of § 1983 suggests any congressional intention to repeal the statutory command of full faith and credit. Respondent, however, does not address the *Allen* and *Migra* holdings or even attempt to demonstrate any manner in which the Reconstruction statutes impliedly repeal the full faith and credit due a state agency adjudication. Instead, respondent relies on dissenting and concurring opinions from three decisions of this Court—*Moore v. City of East Cleveland*, 431 U.S. 494 (1977), *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), and *Patsy v. Board of Regents*, 457 U.S. 496 (1982)—not one of which involved a question of full faith and credit.

Patsy, the most recent decision cited by respondent, held that exhaustion of state administrative remedies is not a prerequisite to instituting a federal court action under § 1983. The fact that respondent was not required to litigate any issue of race discrimination in the state

agency makes the application of issue preclusion in this case particularly compelling. If respondent desired one unencumbered opportunity to litigate his claims under the Reconstruction statutes in federal court, it was available to him before and at all times during the agency adjudication. Instead of pursuing his federal court action, however, respondent voluntarily departed from the available federal forum, submitted the issue of race discrimination to adjudication in the state agency, and pursued the agency adjudication to final judgment.[5] Only after losing the issue of race discrimination in the agency adjudication did respondent return to federal court and seek to litigate the issue again. Having freely chosen the state agency as the forum in which to litigate the issue, however, respondent should not be allowed to avoid the issue preclusion effect of the agency's judgment.

IV. RESPONDENT HAS FAILED TO DEMONSTRATE THAT TITLE VII IMPLIEDLY REPEALS THE FULL FAITH AND CREDIT DUE A STATE AGENCY ADJUDICATION VOLUNTARILY INVOKED BY RESPONDENT OUTSIDE THE TITLE VII ENFORCEMENT SCHEME.

In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468 (1982), this Court extended to Title VII actions the holding in *Allen* that "an exception to § 1738 will not be recognized unless a later statute contains an express or implied partial repeal." Finding no express re-

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[5] The district court's order withdrawing any restraint on employment action against respondent (Dist. Ct. Nr. 14, filed Mar. 29, 1982) certainly cannot be construed as compelling respondent to invoke the agency adjudication in the first place, to litigate issues relevant to his civil rights claims there, or to pursue it to final judgment. Nor did the district court's order stay the proceedings in federal court. Respondent was free at all times, therefore, to pursue his civil rights claims in federal court. He chose instead to pursue the state agency proceedings to final judgment.

peal of full faith and credit in Title VII, this Court went on to reaffirm the " 'cardinal principle of statutory construction that repeals by implication are not favored' . . . and whenever possible, statutes should be read consistently." *Id.* Because no language in Title VII required Kremer to pursue in state court the unfavorable decision by the Title VII state deferral agency and because no language in Title VII prescribes the effect of a state court judgment, this Court held that Title VII does not impliedly repeal the full faith and credit due a state court judgment.

A straightforward application of the reasoning in *Kremer* requires the same conclusion with respect to a state agency adjudication voluntarily invoked by an employee in a purposeful departure from the Title VII enforcement scheme. No language in Title VII required respondent in this case to invoke the due process hearing or to litigate any issue of race discrimination there. No language in Title VII prescribes the effect of the agency adjudication voluntarily invoked by respondent. Nor does the legislative history of Title VII include any reference to the effect of adjudications by agencies other than state antidiscrimination agencies. Neither the language nor the legislative history of Title VII therefore proves any congressional intention to repeal the full faith and credit due an agency adjudication outside the Title VII enforcement scheme.

In an effort to avoid the application of this Court's reasoning in *Kremer*, respondent and the EEOC rely on footnote 7 in *Kremer* to support their position that state agency adjudications are never entitled to preclusive effect in subsequent Title VII actions. Respondent and the EEOC further argue that if Congress intended to repeal the full faith and credit due a state deferral agency decision, it surely must have intended also to repeal the full faith and credit due an agency adjudication outside the Title VII enforcement scheme.

The issue of whether Title VII impliedly repeals the full faith and credit due state deferral agency decisions has not been decided by this Court and is not presented in this case. If the "substantial weight" provision of Title VII were construed as an implied repeal of full faith and credit as to state deferral agencies, however, the congressional purpose would be easily perceived. Because Congress required Title VII claimants to submit their claims of employment discrimination initially to state deferral agencies—thus depriving them of the initial choice of forum—Congress provided that the decisions of those agencies would be entitled to "substantial weight," but not preclusive effect, in subsequent EEOC proceedings. When, as in this case, a claimant freely chooses the initial forum, the critical policy considerations are radically different and demand that the claimant be bound by the results of his chosen forum. *See Thomas*, 448 U.S. at 289-90 (White, J., concurring); *id.* at 294 (Rehnquist, J., dissenting).

Respondent's arguments might have some force if litigation of the issue of race discrimination somehow had been thrust upon respondent against his will. Respondent alone, however, created the circumstance dictating the application of issue preclusion in this case. He voluntarily invoked a state agency adjudication outside the Title VII enforcement scheme and insisted that the issue of alleged racial motivation for his proposed termination be adjudicated there. If respondent wished to pursue a due process hearing to contest his proposed termination prior to or simultaneously with pursuit of his Title VII action, he could have avoided preclusion quite simply by limiting the agency's adjudication to the issues of his work performance and behavior. Having freely chosen to litigate the issue of alleged discriminatory intent in the due process hearing and having lost the issue in the forum of his choice, respondent should not be permitted to avoid the effect of the agency's finding on his Title VII claim.

Respondent's and the EEOC's reliance on the decisions of this Court in *Chandler v. Roudebush*, 425 U.S. 840 (1976), *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in support of their argument that a state agency adjudication is never entitled to preclusive effect in a subsequent Title VII action, is seriously misplaced. All three cases are plainly inapposite to the questions presented here. In *Kremer* this Court explicitly described the *McDonnell Douglas* and *Chandler* decisions as holding "that the 'civil action' in federal court following an EEOC decision was intended to be a trial *de novo*." 456 U.S. at 477. Because the principles of full faith and credit are not implicated in the case of two federal forums, this Court concluded that neither case was dispositive of the full faith and credit question presented in *Kremer*. *Id.* For the same reason, neither is dispositive or even instructive in this case.

This Court also rejected Kremer's reliance on the *Gardner-Denver* decision because arbitration decisions are not subject to the mandate of full faith and credit. Addressing specifically the *Gardner-Denver* finding of "the inappropriateness of arbitration as a forum for the resolution of Title VII issues," *id.* at 478, this Court explicitly stated that the "characteristics [of arbitration] cannot be attributed to state administrative boards and state courts." *Id.* Respondent's argument that state agency adjudications should be treated like arbitration proceedings for full faith and credit purposes was unmistakably rejected by this Court in *Kremer*. Respondent's argument also completely ignores that the state agency in this case was exercising the state's judicial power in a manner prescribed by state law and for the purpose of ensuring that respondent's proposed termination was not in violation of constitutional and statutory provisions. *See* Tenn. Code Ann. § 4-5-322(h)(1) (1985). Unlike arbitration under a collective bargaining agreement, the adjudication in this case was undeniably a state judicial proceeding controlled, not by the intent of the parties, but by governing federal and state law.

While perfunctorily dismissing the critical policy considerations supporting the application of full faith and credit to agency adjudications provided by state law for the express purpose of protecting Fourteenth Amendment liberty and property interests, the EEOC makes the inexplicable argument that applying issue preclusion to the agency adjudication in this case would "upset the division of labor between the EEOC and state FEP agencies currently achieved through worksharing arrangements." (EEOC Br. at 26) This argument completely ignores that the question presented in this Court is whether issue preclusion should apply to an agency adjudication voluntarily invoked by an employee *outside* the Title VII enforcement scheme. Employees are not required to submit their Title VII claims to state agencies other than § 706 deferral agencies established by state law to provide remedies for employment discrimination. Nor does the EEOC enter into worksharing agreements with agencies other than § 706 deferral agencies. Affording full faith and credit to issues adjudicated by agencies outside the Title VII enforcement scheme would have no effect, therefore, on the EEOC's worksharing agreements or on any other aspect of the statutory enforcement scheme, including the full use of state antidiscrimination remedies. For the same reasons, the EEOC's argument that application of preclusion principles would generate confusion and provide a trap for unwary claimants is decidedly unconvincing. There certainly can be no confusion as to those state agencies which are mandatory deferral agencies and those which are not. When an employee purposefully departs from the Title VII enforcement scheme, as respondent did in this case, he is fairly bound by the findings of his chosen forum. Application of issue preclusion is particularly imperative when the forum chosen by the employee is provided by state law for the express purpose of pro-

tecting Fourteenth Amendment liberty and property interests. Denial of issue preclusion would render the state adjudication futile and seriously undermine its integrity.

Conspicuously absent from respondent's argument, as well as that of the EEOC, is any suggestion that the issue of alleged racial motivation for respondent's proposed termination was not properly before and within the scope of the agency's adjudicatory authority. Indeed, once respondent raised the issue of alleged discrimination as an affirmative defense to his proposed termination, the Administrative Law Judge was required to determine the issue. *See* Tenn. Code Ann. § 4-5-322(h)(1) (1985). Also conspicuously absent from respondent's argument and that of the EEOC is any response to this Court's holding in *Marrese v. American Academy of Orthopaedic Surgeons*, —— U.S. ——, 105 S. Ct. 1327 (1985), that absent an exception to the full faith and credit statute, state law determines the issue preclusion effect of a prior state judgment even if it involves a claim within the exclusive jurisdiction of the federal courts. There is neither an express nor an implied exception in Title VII to the obligation of a federal court to extend full faith and credit to state agency adjudications voluntarily invoked outside the Title VII enforcement scheme. Therefore, even though the agency in this case did not have jurisdiction to determine respondent's Title VII claim, Tennessee law properly determines the issue preclusion effect of the agency adjudication. The Sixth Circuit's refusal to follow the mandate of full faith and credit by applying Tennessee rules of preclusion to the agency adjudication in this case requires reversal of the judgment below.

CONCLUSION

The Sixth Circuit's judgment should be reversed and this case remanded for a determination of the issue preclusion effect to which the agency adjudication in this case is entitled under Tennessee law and the effect of issue preclusion on respondent's claims under the Reconstruction statutes and Title VII.

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